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No. 14-280

# In the Supreme Court of the United States

HENRY MONTGOMERY, PETITIONER

*v.*

STATE OF LOUISIANA

*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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## QUESTIONS PRESENTED

1. Whether the rule announced in *Miller* v. *Alabama*, 132 S. Ct. 2455, 567 U.S. __ (2012), applies retroactively under the framework set out in *Teague* v. *Lane*, 489 U.S. 288 (1989).

2. The Court added the following question: Do we have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to our decision in *Miller* v. *Alabama*, 567 U.S. __ (2012)?

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER**

## INTEREST OF THE UNITED STATES

In *Miller* v. *Alabama*, 132 S. Ct. 2455 (2012), this Court held that the Eighth Amendment forbids mandatory sentences of life imprisonment without parole for homicide offenses committed by juveniles (persons under age 18). *Id.* at 2460. The United States has identified at least 27 federal prisoners serving mandatory life sentences for homicide offenses that they committed when they were juveniles who may be entitled to relief under *Miller*.[1] The United States has a substantial interest in whether *Miller* applies retroactively to these defendants under the framework in *Teague* v. *Lane*, 489 U.S. 288 (1989), which the state courts applied in this case.

[1] This estimate includes juvenile offenders who were sentenced before *United States* v. *Booker*, 543 U.S. 220 (2005), under Sentencing Guidelines that provided for mandatory life sentences.

## STATEMENT

1. When he was 17 years old, petitioner killed Charles Hurt, a deputy sheriff in East Baton Rouge, Louisiana. Pet. App. 1; *State* v. *Montgomery*, 181 So. 2d 756, 757 (La. 1966). Petitioner was tried as an adult in state court, convicted of murder, and sentenced to death. See *ibid.*

The Louisiana Supreme Court vacated petitioner's conviction and sentence and remanded for a new trial. *Montgomery*, 181 So. 2d at 762. A jury convicted petitioner of murder but did not recommend a death sentence. *State* v. *Montgomery*, 242 So. 2d 818, 818 (La. 1970). Petitioner's conviction subjected him to mandatory life imprisonment without the possibility of parole. See La. Rev. Stat. Ann. §§ 14:30 & cmt., 15:409 (1951). The trial court imposed that sentence, and the Louisiana Supreme Court affirmed. *Montgomery*, 242 So. 2d at 820.

2. After petitioner's conviction and sentence became final, this Court decided *Miller* v. *Alabama*, 132 S. Ct. 2455 (2012). In *Miller*, the Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual' punishments." *Id.* at 2460. The Court explained that a sentencer must "have the ability to consider the mitigating qualities of youth" rather than imposing mandatory life without parole. *Id.* at 2467 (citation and internal quotation marks omitted).

3. Petitioner sought collateral review in state court, challenging his sentence under *Miller*. See Pet. App. 1-2; J.A. 12-17; see also La. Code Crim. Proc. Ann. art. 882(A) (2008). Respondent opposed resentencing on the ground that *Miller* does not apply ret-

roactively to cases on collateral review. See J.A. 45-57.

The trial court denied petitioner's motion. Pet. App. 1-2. It concluded that *Miller* does not apply retroactively because it does not "completely remove[] a particular punishment from the list of punishments that can be constitutionally imposed on a class of defendants," *id.* at 1, or qualify as a "watershed rule[] of criminal procedure" that "implicat[es] the fundamental fairness and accuracy of the criminal proceeding," *id.* at 2 (citation omitted).

Petitioner sought appellate review, and his case was transferred to the Louisiana Supreme Court. Pet. App. 3; J.A. 87, 132; see La. Const. Art. V, § 5(E).

4. Meanwhile, the Louisiana Supreme Court held in another case that *Miller* does not apply retroactively to cases on state collateral review. *State* v. *Tate*, 130 So. 3d 829, 841 (2013), cert. denied, 134 S. Ct. 2663 (2014). The court noted that it uses the retroactivity standards in *Teague* v. *Lane*, 489 U.S. 288 (1989), for "all cases on collateral review in our state courts." *Tate*, 130 So. 3d at 834 (quoting *State ex rel. Taylor* v. *Whitley*, 606 So. 2d 1292, 1297 (La. 1992), cert. denied, 508 U.S. 962 (1993)).

Applying *Teague*, the court concluded that *Miller* is not retroactive. The court classified *Miller*'s rule as procedural, rather than substantive, because "[i]t did not alter the range of conduct or persons subject to life imprisonment without parole for homicide offenses" but "simply altered the range of permissible methods for determining whether a juvenile could be sentenced to life imprisonment without parole for [a homicide] conviction." *Tate*, 130 So. 3d at 836-837 (emphasis omitted). The court also concluded that

*Miller* did not establish a "watershed" procedural rule. *Id.* at 839 (citations omitted).

Two Justices dissented. See *Tate*, 130 So. 3d at 844-849 (Johnson, C.J., dissenting). The dissent found that *Miller* announced a substantive rule because it "invalidates mandatory sentencing regimes that permit only one sentencing outcome" and "requir[es] that an alternative sentencing option be made available to juvenile defendants convicted of homicide." *Id.* at 845-846. The dissent also concluded that *Miller* sets out a "watershed" procedural rule. *Id.* at 847.

5. In light of *Tate*, the Louisiana Supreme Court summarily denied relief in petitioner's case. Pet. App. 3; see J.A. 6. One Justice dissented, arguing that *Miller* states a substantive rule that should apply retroactively. Pet. App. 4 (Johnson, C.J., dissenting).

## SUMMARY OF ARGUMENT

I. *Miller* v. *Alabama*, 132 S. Ct. 2455 (2012), announced a new substantive rule that applies retroactively to cases on collateral review.

A. Under *Teague* v. *Lane*, 489 U.S. 288 (1989), a new rule announced by this Court generally does not apply retroactively to cases that have become final on direct review. But a new rule applies retroactively in two circumstances. First, a new substantive rule, such as a rule that limits the conduct that is criminal or the punishment for certain offenders, is not subject to *Teague* and applies retroactively. *Schriro* v. *Summerlin*, 542 U.S. 348, 351-352 & n.4 (2004). Second, a new rule of procedure applies retroactively when it falls within the narrow category of "watershed" rules that "alter our understanding of the bedrock procedural elements" essential to a fair trial. *Teague*, 489 U.S. at

311 (plurality opinion) (emphasis and citation omitted).

B. The *Miller* rule is a "new" constitutional rule: it was not "dictated by" prior precedents. *Teague*, 489 U.S. at 301 (plurality opinion) (emphasis omitted). Rather, *Miller* combined and extended two strands of precedent—decisions that categorically preclude certain punishment for juvenile offenders because of their youth, and decisions that require individualized sentencing in capital cases—to conclude that the Eighth Amendment prohibits mandatory life-without-parole sentences for juvenile homicide offenders. That lower courts had rejected such a rule before the Court's decision further signals that *Miller*'s rule is new.

C. The *Miller* rule is substantive, not merely procedural. *Miller*'s holding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," 132 S. Ct. at 2469, requires jurisdictions to provide a broader range of sentences than is available under a mandatory-life-imprisonment regime. Invalidating mandatory life-without-parole sentences for juvenile homicide offenders means that less severe sentences must be allowed. That expansion of sentencing outcomes is a substantive change in the law. Experience since *Miller*—in which juvenile homicide defendants have been resentenced to lesser sentences and jurisdictions have changed their laws—confirms that the decision worked a substantive change in the law.

*Miller* does have a procedural component, in that it requires individualized consideration of the appropriate sentence for a juvenile homicide offender. And

that component is not a "watershed" procedural rule. But *Miller* is not essentially procedural, because *Miller* changes not only the process of sentencing, but also the range of sentences that are available.

Characterizing *Miller* as substantive aligns with *Teague*'s objectives. Rules with only procedural effects ordinarily are not retroactive because the interest in finality outweighs the speculative effect of the new rule on a conviction or sentence. But substantive rules that expand the available sentences raise a real risk that a person has been subjected to an unjustified punishment—a situation serious enough to justify reopening final cases. And recognizing that *Miller* announced a substantive rule is unlikely to lead to other rulings that would upset the finality of criminal sentences.

II. This Court has jurisdiction to review the Louisiana Supreme Court's refusal to give retroactive effect to *Miller*.

A. The Louisiana Supreme Court has adopted all aspects of the *Teague* doctrine to govern the retroactivity of new federal constitutional rules to cases on state collateral review. Although a State may choose to give broader retroactive effect to federal constitutional decisions than would be afforded under *Teague*, see *Danforth* v. *Minnesota*, 552 U.S. 264, 282 (2008), the Louisiana Supreme Court has chosen to use *Teague* and to rely exclusively on federal decisions.

B. In *Michigan* v. *Long*, 463 U.S. 1032 (1983), this Court determined that when a state court's decision rests primarily on, or is interwoven with, federal law, with no clear reliance on an independent state ground, this Court has jurisdiction to review the federal-law issue. *Id.* at 1040-1041. Here, the Louisiana Supreme

Court's decision finding *Miller* non-retroactive did rely exclusively on federal law, and not on any independent state retroactivity standard.

*Long*'s test does not conclusively resolve this case because an antecedent question exists: whether it matters that Louisiana chose to adopt *Teague* as its own test for retroactivity. In a typical *Long* case, federal law applies of its own force; here, Louisiana chose to apply federal law. But that does not preclude jurisdiction here, because, as this Court has explained, when a state court adopts federal standards and bases its decision on its interpretation of federal law, this Court has jurisdiction to review the application of those federal standards. Although no prior decision has addressed a situation entirely like this one, the principles animating this Court's conclusion that it has certiorari jurisdiction to review embedded questions of federal law justify review of the federal question here. The Louisiana Supreme Court based its retroactivity determination on its understanding of *Teague* principles, and this Court may correct that understanding if it is mistaken.

It is particularly appropriate for this Court to correct the Louisiana Supreme Court's mistaken understanding of federal law in this case for two reasons. First, correcting the state court's *Teague* error avoids deciding a significant constitutional question: whether *Teague*'s exceptions to the general rule of non-retroactivity define a constitutional floor that a State must observe in its collateral review of federal constitutional claims. See *Danforth*, 552 U.S. at 269 n.4 (reserving this issue). Second, exercising jurisdiction based on the State's incorporation of federal law furthers federalism principles by avoiding potentially

intrusive federal habeas review, instead allowing the state court to correctly apply the federal law it has incorporated. This Court should reverse the judgment of the Louisiana Supreme Court and remand for further proceedings.

## ARGUMENT

### I. *MILLER* ANNOUNCED A NEW SUBSTANTIVE RULE THAT APPLIES RETROACTIVELY ON COLLATERAL REVIEW

In *Miller* v. *Alabama*, 132 S. Ct. 2455 (2012), this Court held that the Eighth Amendment bars sentencing juvenile offenders to mandatory sentences of life imprisonment without the possibility of parole. *Id.* at 2460. Under *Teague* v. *Lane*, 489 U.S 288 (1989), that rule applies retroactively to cases on collateral review because it is substantive. *Miller* does not simply alter sentencing procedures; it expands the range of possible sentencing outcomes for a category of defendants by requiring the possibility of a sentence less than life without parole.[2]

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[2] In a companion case to *Miller*, *Jackson* v. *Hobbs*, 132 S. Ct. 2455 (2012), the Court granted relief to a juvenile offender who challenged the state court's denial of collateral relief. *Id.* at 2461, 2475. The Court's disposition of *Jackson* does not control the outcome here. Even assuming that *Teague* applies on this Court's review of a state collateral-review decision, the State did not challenge retroactivity in *Jackson* and the issue was not before the Court. See *Collins* v. *Youngblood*, 497 U.S. 37, 41 (1990) (*Teague* is not jurisdictional).

### A. Under *Teague*, New Rules Apply On Collateral Review Only When They Are Substantive Rules Or Watershed Procedural Rules

Retroactivity principles apply differently to cases pending on direct and collateral review. In *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), the Court held that a "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Id.* at 328. In *Teague* v. *Lane*, *supra*, the Court took a different approach to retroactivity for criminal convictions that have become final on direct review and are challenged in federal habeas corpus proceedings. The Court explained that "new" constitutional rules—those not "dictated by precedent existing at the time the defendant's conviction became final"—generally "will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 301, 310 (plurality opinion) (emphasis omitted); see *id.* at 319-320 (Stevens, J., concurring in part and concurring in the judgment).[3] But *Teague*, and cases following it, identify two circumstances in which a new rule will apply retroactively to cases on collateral review.

First, "[n]ew substantive rules generally apply retroactively" and are "not subject to [*Teague*'s] bar." *Schriro* v. *Summerlin*, 542 U.S. 348, 351-352 & n.4 (2004) (emphasis omitted); see *Teague*, 489 U.S. at 311 (plurality opinion). Such rules "include[] decisions that narrow the scope of a criminal statute by inter-

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[3] The Court adopted the *Teague* plurality's approach to retroactivity in *Penry* v. *Lynaugh*, 492 U.S. 302, 313-314 (1989), overruled on other grounds by *Atkins* v. *Virginia*, 536 U.S. 304 (2002).

preting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Summerlin*, 542 U.S. at 351-352 (citations omitted).

Second, although "[n]ew rules of procedure" generally "do not apply retroactively," an exception exists for "watershed rules" that "implicat[e] the fundamental fairness and accuracy of the criminal proceeding." *Summerlin*, 542 U.S. at 352 (citations omitted); see *Teague*, 489 U.S. at 311-314 (plurality opinion). That exception is limited to procedural rules that are "necessary to prevent an impermissibly large risk of an inaccurate conviction" and that "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton* v. *Bockting*, 549 U.S. 406, 418 (2007) (citations and internal quotation marks omitted).

**B. *Miller* Prescribes A "New" Constitutional Rule**

Whether a rule applies retroactively depends initially on whether it is "new." *Chaidez* v. *United States*, 133 S. Ct. 1103, 1107 (2013). A rule is new if it "breaks new ground or imposes a new obligation" on the government, meaning that it was not "*dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (plurality opinion). A rule is dictated by precedent if the rule "would have been apparent to all reasonable jurists" who considered the issue. *Chaidez*, 133 S. Ct. at 1107 (citation and internal quotation marks omitted). It is not enough that a rule was "support[ed]" by precedent, *Beard* v. *Banks*, 542 U.S. 406, 414 (2004), or even that it represents the "most reasonable" interpretation of precedent, *Lambrix* v. *Singletary*, 520 U.S. 518, 538 (1997). Unless "all reasonable jurists" who

considered the legal landscape when the defendant's conviction became final would have recognized the rule, the rule is new. *Id.* at 527-528.

The rule announced in *Miller* is a "new" rule. The Court's holding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," *Miller*, 132 S. Ct. at 2469, was not dictated by existing precedent. The *Miller* Court reached its holding by combining and extending "two strands of precedent." *Id.* at 2463. The first line involved "categorical bans" on sentences found disproportionate for classes of offenders. *Ibid.* Two such holdings involved juvenile offenders: *Roper* v. *Simmons*, 543 U.S. 551, 574-575 (2005), which categorically banned capital punishment for juvenile offenders, and *Graham* v. *Florida*, 560 U.S. 48, 82 (2010), which prohibited life-without-parole sentences for juvenile offenders convicted of non-homicide offenses. See also *id.* at 60-61 (citing other cases). That line of precedent did not dictate the result in *Miller*, because the Court had limited its prohibition on life-without-parole sentences to non-homicide offenses. See *id.* at 68-69.

A second line of precedent, however, was also relevant: decisions "prohibit[ing] mandatory imposition of capital punishment" without individualized consideration of the characteristics of the defendant and his offense. *Miller*, 132 S. Ct. at 2463-2464; see, *e.g.*, *Woodson* v. *North Carolina*, 428 U.S. 280, 301 (1976) (plurality opinion) (prohibiting mandatory death sentences). Those decisions reasoned that because capital punishment is "different from all other sanctions in kind rather than degree," the sentencer must consider "the character and record of the individual offender

and the circumstances of the particular offense." *Woodson*, 428 U.S. at 303-304 (plurality opinion).

*Miller* extended the first line of precedent—the *Roper-Graham* line—to conclude that juveniles are "constitutionally different" for sentencing purposes even when they commit homicide. 132 S. Ct. at 2464. The Court then extended the second line of precedent —the *Woodson* line—beyond the death-penalty context to hold that sentencers must consider the characteristics of juvenile offenders and the circumstances of their offenses before imposing the most severe sentence available—life without parole. *Id.* at 2467.

While the *Miller* rule was supported by those precedents, it was not dictated by them. The Court repeatedly noted the limits of prior decisions, indicating that its rule extended those decisions.[4] The Court also explained that the "confluence" of lines of precedent "le[d] to" the Court's conclusion, not that the conclusion was dictated by prior decisions. 132 S. Ct. at 2464; see, *e.g.*, *id.* at 2465, 2467 (*Graham* line of cases is "implicate[d]," and *Woodson* line of cases is "relevant," to the Court's analysis); see also *Sawyer* v. *Smith*, 497 U.S. 227, 236 (1990) (rule may be new even though prior cases "lent general support" to the conclusion later reached). The conclusion that *Miller* announced a new rule is supported by the lower courts' rejection, before *Miller*, of constitutional challenges to mandatory life-without-parole sentences for

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[4] See, *e.g.*, *Miller*, 132 S. Ct. at 2465 (*Graham* rule "applied only to nonhomicide crimes"; the Court "took care to distinguish those offenses from murder, based on both moral culpability and consequential harm"); *id.* at 2466 n.6 ("*Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses.").

juvenile homicide offenders, even after *Roper* and *Graham*.[5] See *Chaidez*, 133 S. Ct. at 1109 (rule was new where "state and lower federal courts * * * [had] almost unanimously" rejected it).

### C. The *Miller* Rule Is Substantive

Because *Miller* sets out a new rule, the next question is whether the rule is substantive or procedural. Although *Miller* has a procedural component, its primary effect is substantive: it forecloses mandatory life-without-parole sentences for juvenile homicide offenders, thereby expanding the range of possible sentencing outcomes. That makes the *Miller* rule substantive under *Teague*.

1. The distinction between substantive and procedural rules under *Teague* reflects the fundamental difference between the way a case is adjudicated (procedure) and the possible outcomes of the case (substance). The Court's cases reflect that a rule that alters the range of permissible outcomes is substantive, while a rule that alters only the manner of determining the defendant's guilt or sentence is procedural. See, *e.g.*, *Summerlin*, 542 U.S. at 353 (a substantive rule "alters the range of conduct or the class of persons that the law punishes," while a procedural rule "regulate[s] only the *manner of determining* the defendant's culpability").

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[5] See, *e.g.*, *Miller* v. *State*, 63 So. 3d 676, 691 (Ala. Crim. App. 2010), rev'd, 132 S. Ct. 2455 (2012); *Jackson* v. *Norris*, 378 S.W.3d 103, 106 (Ark. 2011), rev'd *sub nom. Miller* v. *Alabama*, *supra*; *State* v. *Kelly*, 46 So. 3d 229, 233-234 (La. Ct. App. 2010), writ denied, 56 So. 3d (La. 2011); *State* v. *Andrews*, 329 S.W.3d 369, 377-378 (Mo. 2010), cert. denied, 131 S. Ct. 3070, and 132 S. Ct. 260 (2011); *Meadoux* v. *State*, 325 S.W.3d 189, 193-196 (Tex. Crim. App. 2010), cert. denied, 131 S. Ct. 1827 (2011).

The *Teague* Court originally described a substantive rule as a rule that "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" 489 U.S. at 307 (plurality opinion) (quoting *Mackey* v. *United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in the judgment)). Although *Teague* considered a constitutional rule, the Court later applied the same general principles to new rules that narrow the scope of a federal criminal statute by statutory interpretation. See *Bousley* v. *United States*, 523 U.S. 614, 616, 620-621 (1998) (holding that the rule in *Bailey* v. *United States*, 516 U.S. 137 (1995), that "us[e]" of a firearm in violation of 18 U.S.C. 924(c)(1) (Supp. II 1990) requires "active employment of the firearm," applies retroactively to cases on collateral review).

The Court also expanded the category of substantive rules to include rules that categorically preclude a particular type of punishment for all offenders or for a certain class of offenders. See *Penry* v. *Lynaugh*, 492 U.S. 302, 329-330 (1989) ("[A] new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all."), overruled on other grounds by *Atkins* v. *Virginia*, 536 U.S. 304 (2002). Accordingly, the Court has described "[n]ew substantive rules" as including "decisions that narrow the scope of a criminal statute by interpreting its terms," as well as decisions "that place particular conduct or persons covered by the statute beyond the State's power to punish." *Summerlin*, 542 U.S. at 351-352 (emphasis omitted). Those types of rules do more than affect how a case is decided; they alter the range of possible outcomes.

Procedural rules, by contrast, "regulate only the *manner of determining* the defendant's culpability." *Summerlin*, 542 U.S. at 353. Procedural rules "do not produce a class of persons convicted of conduct the law does not make criminal" or subjected to an illegal sentence. *Id.* at 352. For example, the rule that a jury, rather than a judge, must find the aggravating factors required to render a capital defendant death-eligible is a procedural rule because it "alter[s] the range of permissible methods for determining whether a defendant's conduct is punishable by death" without "alter[ing] the range of conduct [state] law subjected to the death penalty." *Id.* at 353 (addressing retroactivity of *Ring* v. *Arizona*, 536 U.S. 584 (2002)).

Taken together, the Court's descriptions of "substantive" and "procedural" rules under *Teague* explain that rules that go beyond regulating only the "manner" of determining culpability—and instead categorically change the range of outcomes—qualify as substantive rules.

2. The rule that juveniles may not receive mandatory life-without-parole sentences for homicide is a substantive rule because it expands the range of permissible sentencing outcomes for those offenders. Before *Miller*, a juvenile convicted of homicide in a jurisdiction that mandated life without parole could receive only one possible sentence—life imprisonment without the possibility of release. Under *Miller*, however, a juvenile offender convicted in the same jurisdiction for the same offense now could receive a range of sentences—not only life imprisonment without parole but also some lesser sentence (either life imprisonment with parole or a term of years). That is a substantive change in the law.

*Miller* differs from previous decisions in which this Court has announced substantive rules in that those decisions narrowed, rather than expanded, the range of permissible outcomes of the criminal process. In prior decisions, the Court has deemed certain rules retroactive because they "narrow the scope of a criminal statute" or "place particular conduct or persons * * * beyond the State's power to punish." *Summerlin*, 542 U.S. at 351-352. But the Court has not precluded characterizing as substantive a new rule that expands the range of sentencing outcomes for a class of defendants. And recognizing such an expansion as a substantive rule makes sense. Rules that narrow the range of sentencing options and rules that expand them alter the substantive law: to comply with the rule, a jurisdiction must change the permissible punishments, not just how to determine them.

Although the Court has not considered the retroactive effect of a constitutional rule that expanded possible sentencing outcomes, the Court's descriptions of substantive and procedural rules support categorizing an outcome-expanding rule as substantive. The Court has been careful to say that the category of substantive rules "includes" rules that make certain conduct non-criminal or that preclude certain sentences, without restricting the category to such rules. *Summerlin*, 542 U.S. at 351-352. And the expansion over time of what constitutes a substantive rule, see p. 14, *supra*, confirms that the category of substantive rules is not limited to the original formulation in *Teague* itself. At the same time, the Court has used precise language to delineate the category of procedural rules that are ordinarily non-retroactive, stating that procedural rules are those regulating "only the manner of deter-

mining culpability." *Summerlin*, 542 U.S. at 353 (emphasis omitted). The *Miller* rule does not affect "only the manner of determining culpability," but mandates consideration of more lenient substantive outcomes.

The experience post-*Miller* confirms that the *Miller* rule is substantive. *Miller* invalidated existing state and federal mandatory life-without-parole sentencing regimes for juvenile offenders, requiring States and the federal government to provide a range of sentencing outcomes that includes the possibility of a sentence of less than life imprisonment. For example, Congress has mandated sentences of at least life imprisonment for dozens of homicide offenses under federal law[6] and has prohibited parole or early release for individuals serving life sentences.[7] After *Miller*, those statutes may not be enforced as written. See App. A, *infra* (collecting cases in which federal courts have resentenced juvenile offenders after *Miller*).

Several States have also recognized that *Miller* narrowed their mandatory-life-imprisonment statutes by excluding juveniles from their scope. For example, the Mississippi Supreme Court explained that before *Miller*, "everyone convicted of murder in Mississippi was sentenced to life imprisonment and was ineligible

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[6] 18 U.S.C. 34, 115(b)(3), 175c(c)(3), 229A, 351(a), 924(c)(1)(C)(ii), 930(c), 1091(b)(1), 1111, 1114, 1116(a), 1118(a), 1119(b), 1120(a), 1121(a), 1201(a), 1203(a), 1503(b)(1), 1512(a), 1513(a), 1651, 1716(j)(3), 1751(a), 1841(a)(2), 1958(a), 2113(e), 2332g(c)(3), 2332h(c)(3), 3559(d)(1) and (f)(1); 21 U.S.C. 461(c), 675, 1041(b); 42 U.S.C. 2272(b); 49 U.S.C. 46502.

Congress also has mandated sentences of life imprisonment for certain serious non-homicide offenses. See 18 U.S.C. 3559(c)(1); 21 U.S.C. 841(b)(1)(A)-(C), 960(b)(1)-(3).

[7] 18 U.S.C. 3624(a)-(b).

for parole," but after *Miller*, "Mississippi's current sentencing and parole statutes could not be followed in homicide cases involving juvenile defendants." *Jones* v. *State*, 122 So. 3d 698, 702 (2013) ("*Miller* modified our substantive law by narrowing its application for juveniles."); see also, *e.g.*, *People* v. *Davis*, 6 N.E.3d 709, 722 (Ill.) ("*Miller* mandates a sentencing range broader than that provided by statute for minors convicted of first degree murder who could otherwise receive only natural life imprisonment.") (citation omitted), cert. denied, 135 S. Ct. 710 (2014).

Likewise, Louisiana's legislature recognized *Miller*'s effect on existing statutes by enacting new legislation that permits a sentencer to sentence a juvenile homicide offender to either life imprisonment without parole or life imprisonment with eligibility for parole. See *State* v. *Tate*, 130 So. 3d 829, 841-843 (La. 2013), cert. denied, 134 S. Ct. 2663 (2014); see also La. Code Crim. Proc. Ann. art. 878.1 (2015) (requiring a court to conduct a hearing before sentencing a juvenile homicide offender to "determine whether the sentence shall be imposed with or without parole eligibility"); La. Rev. Stat. Ann. § 15:574.4(E)(1) (2015) (setting out conditions for parole eligibility for a juvenile homicide offender who received a life-with-parole sentence). Consequently, Louisiana now has a new sentencing option for juvenile homicide offenders—life imprisonment with the possibility of parole.

3. The *Miller* rule does have a procedural component: it requires the sentencer to give individualized consideration to a juvenile homicide offender to account for "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 132 S. Ct. at 2469. The

requirement to consider certain sentencing factors bears on the procedures a court must employ before imposing sentence. This aspect of *Miller* states a procedural rule, although not a "watershed" rule.[8]

But characterizing the *Miller* rule as entirely procedural under *Teague* would overlook the rule's necessary implications for the substantive criminal law. *Miller* does not regulate "*only* the *manner of determining* the defendant's culpability" or sentence. *Summerlin*, 542 U.S. at 353 (first emphasis added). Instead, *Miller* gives juvenile offenders the opportunity to obtain different and more favorable outcomes than before *Miller*. That is a substantive change in the law.

*Miller*'s alteration of the range of available sentencing outcomes distinguishes it from decisions that this Court has recognized are purely procedural. For example, the rule in *Ring* that the jury, rather than the judge, must decide aggravating factors in capital

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[8] Petitioner contends (Br. 28-30), in the alternative, that *Miller* is a watershed rule. To qualify as watershed, a procedural rule "must be necessary to prevent an impermissibly large risk of an inaccurate conviction" and "must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton*, 549 U.S. at 418 (citations and internal quotation marks omitted). *Miller* does not fundamentally "alter our understanding of the bedrock" procedures necessary for a fair trial. Even assuming that a watershed rule could bear only on sentencing, *Miller* applies only to the sentencing of a narrow category of offenders—juvenile homicide defendants. And its expansion of the factors that must be considered before sentencing does not work the sort of "profound and sweeping change" on our system of criminal justice that *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), produced, nor does it share "the primacy and centrality of the *Gideon* rule." *Whorton*, 549 U.S. at 421 (citations and internal quotation marks omitted).

sentencing "allocate[s] decisionmaking authority" but does not change the sentencing options available. *Summerlin*, 542 U.S. at 353; see *id.* at 355 n.5 (*Ring* did not change "the actual content of state law"). Similarly, this Court has several times held that rules addressing the material to be considered by capital sentencing juries are procedural and thus not retroactive.[9] The rules at issue in those cases concerned the manner in which the sentencer decides whether a death sentence is appropriate; none altered the range of punishments the jury may impose.

Respondent contends (Br. in Opp. 19-20) that the *Miller* rule is procedural because the Court noted that its rule "does not categorically bar a penalty for a class of offenders or type of crime" but "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Miller*, 132 S. Ct. at 2471. But that language did not address retroactivity under *Teague*; it simply contrasted the reach of *Miller* with the effects of the

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[9] See, *e.g.*, *Banks*, 542 U.S. at 408, 420 (rule that juries may consider mitigating factors even if not found unanimously is not retroactive); *O'Dell* v. *Netherland*, 521 U.S. 151, 153, 167 (1997) (rule that capital defendant may introduce evidence of his parole ineligibility to rebut argument about future dangerousness is not retroactive); *Sawyer*, 497 U.S. at 229, 232, 244-245 (rule that capital sentence may not be imposed when the jury is led to believe that responsibility for the death penalty lies elsewhere is not retroactive); see also *Graham* v. *Collins*, 506 U.S. 461, 477-478 (1993) (proposed rule that would require special instruction to capital sentencing jury about mitigating factors would not be retroactive); *Saffle* v. *Parks*, 494 U.S. 484, 486, 494-495 (1990) (proposed rule about jury instruction not to rely on sympathy for the defendant would not be retroactive).

Court's decision in *Graham*, which barred sentences of life imprisonment for juveniles convicted of non-homicide offenses. See *ibid.* And it does not address the fact that *Miller* mandated that new and more favorable sentencing outcomes be available to defendants who previously had faced only one outcome—which is a substantive (not procedural) rule under *Teague*.

4. Characterizing a rule that expands the range of sentencing outcomes as substantive accords with *Teague*'s objectives. The *Teague* principles balance the respect accorded to a final judgment and the interest in fundamental fairness in criminal proceedings. The Court has explained that procedural rules generally do not apply retroactively because the interest in finality outweighs the speculative effect of the new rule on a conviction or sentence. See *Summerlin*, 542 U.S. at 352; see also *Teague*, 489 U.S. at 310 (plurality opinion).

Substantive rules, in contrast, apply retroactively because their effects on the fairness of a defendant's conviction or sentence are sufficiently profound to justify upsetting final judgments. The Court has observed that the substantive rules it has recognized "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him," and that risk is sufficient to overcome a State's interests in finality and comity. *Summerlin*, 542 U.S. at 352 (citations and internal quotation marks omitted).

The same reasoning applies to *Miller*. Although the Court did not preclude a life-without-parole sentence for a juvenile homicide defendant, the Court

expected that, in light of juveniles' "diminished culpability and heightened capacity for change," life without parole would be an "uncommon" sentence. *Miller*, 132 S. Ct. at 2469. The Louisiana legislature has made the same judgment, stating in its new sentencing statute for juvenile homicide offenders that "[s]entences imposed without parole eligibility should normally be reserved for the worst offenders and the worst cases." La. Code Crim. Proc. Ann. art. 878.1 (2015). And the federal experience proves this point: all of the federal juvenile offenders who have been resentenced under *Miller* have received sentences less severe than life imprisonment without parole. See App. A, *infra*. Because *Miller* makes available new, less severe sentences to juveniles who otherwise will spend the rest of their lives in prison, it should apply retroactively even to those judgments that have already become final on direct review.

Respondent contends (Br. in Opp. 32-34) that *Miller* should not apply retroactively to cases on collateral review because it will require new sentencing hearings, which may be difficult because the relevant witnesses and records may be unavailable. But this Court already considered the potentially disruptive effects of applying a new substantive rule retroactively and has concluded, as a categorical matter, that the costs of retroactive application are justified by the effects of the rule. See *Teague*, 489 U.S. at 306-307 (plurality opinion). Respondent's practical arguments could also be raised against the rules in *Roper* and *Graham*—rules that respondent acknowledges have been applied retroactively. See Br. in Opp. 29-30. Just as with those decisions, the potential costs of resentencings in the wake of *Miller* do not warrant a

departure from the Court's longstanding holding that substantive rules apply retroactively on collateral review. And in any event, a State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. Several States have done so.[10]

5. Recognizing that *Miller* is substantive is unlikely to open the door to additional substantive rules that will impair the finality of convictions. *Miller* applies substantively only because it eliminates a mandatory punishment. If the punishment were not mandatory—if, for example, the Court had held that sentencers must be permitted to consider the mitigating effects of youth before selecting a sentence from an existing range—then *Miller* would fit comfortably within this Court's definition of a procedural rule and would not apply retroactively on collateral review. See pp. 18-21, *supra*.

In only one prior context has the Court invalidated a sentence because of its mandatory character: the imposition of mandatory capital punishment. See *Woodson*, 428 U.S. at 305 (plurality opinion); see also *Sumner* v. *Shuman*, 483 U.S. 66, 77-78, 85 (1987);

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[10] See, *e.g.*, Ark. Code Ann. § 5-4-104(b) (Supp. 2013) (juvenile homicide offenders eligible for parole after 28 years); Del. Code Ann. tit. 11, §§ 4204A(d), 4209A (Supp. 2014) (parole eligibility after 30 years); Fla. Stat. Ann. § 921.1402 (West 2015) (parole consideration after 25 years); La. Rev. Stat. Ann. § 15:574.4(E) (2015) (parole eligibility after 35 years); N.C. Gen. Stat. § 15A-1340.19A (2013) (parole eligibility after 25 years); 18 Pa. Cons. Stat. § 1102.1 (West 2015) (parole eligibility after 25 or 35 years, depending on offender's age); Utah Code Ann. § 76-3-207.7 (LexisNexis 2012); *id.* § 76-5-202(3)(e) (LexisNexis Supp. 2014) (parole eligibility after 25 years); Wyo. Stat. Ann. § 6-10-301(c) (2013) (parole eligibility after 25 years).

*Roberts* v. *Louisiana*, 428 U.S. 325, 336 (1976) (plurality opinion). Like the *Miller* rule, the rule in *Woodson* has a procedural component, in that the Court determined that capital sentencing juries must be permitted to make an individualized analysis of the offender and the offense. See *Woodson*, 428 U.S. at 303-305 (plurality opinion). But that was not the full effect of the ruling. By requiring individualized consideration before imposing the harshest penalty available by law, *Woodson* also required that a more lenient sentencing option be available. Both the *Miller* rule and the prohibition on mandatory death sentences in *Woodson* do more than alter the sentencing process; they also change the range of permissible sentences for defendants exposed to the harshest penalty allowed by law.

This Court never considered whether the *Woodson* rule was "substantive" and thus retroactive because its mandatory capital-punishment decisions predated *Teague* and, by the time of *Sumner*, only three individuals in the United States were under mandatory death sentences. *Sumner*, 483 U.S. at 72-73 n.2. But it is unlikely that, after holding mandatory death sentences unconstitutional, the Court would have denied collateral relief on non-retroactivity grounds for a capital defendant who never had an opportunity to argue for a sentence less than death. The same should be true for *Miller*, where the Court extended *Woodson* because it viewed the "juvenile life sentences as analogous to capital punishment." 132 S. Ct. at 2467 (citation omitted). Just as *Woodson* expanded the range of sentencing outcomes for adults convicted of capital crimes, *Miller* expanded the range of sentencing outcomes for juveniles convicted of homicide

crimes. That substantive effect justifies the retroactive application of *Miller*.

## II. THIS COURT HAS JURISDICTION TO REVIEW THE LOUISIANA SUPREME COURT'S RELIANCE ON *TEAGUE* TO FIND *MILLER* NON-RETROACTIVE

The Louisiana Supreme Court has adopted federal *Teague* standards to govern its retroactivity decisions, and it applied those standards to decide this case. This Court has jurisdiction to review that decision and correct the state court's misunderstanding of federal law.

### A. Louisiana Has Adopted Federal *Teague* Law To Govern Retroactivity On State Collateral Review

1. *Teague* establishes the standards for application of new constitutional and statutory rules to cases on collateral review in federal habeas corpus, and its retroactivity framework does not preclude state courts from granting greater retroactive effect to federal decisions. *Danforth* v. *Minnesota*, 552 U.S. 264, 282 (2008). The Louisiana Supreme Court, however, relies exclusively on the *Teague* framework to determine when new rules will be applied to criminal cases on state collateral review.

In *State ex rel. Taylor* v. *Whitley*, 606 So. 2d 1292 (1992), cert. denied, 508 U.S. 962 (1993), the Louisiana Supreme Court explained that, although it is "not bound to adopt the *Teague* standards," it would do so because "the consideration of finality in criminal proceedings" underlying the *Teague* framework "is equally applicable in state proceedings as well as federal proceedings." *Id.* at 1296-1297. The court therefore "adopt[ed] Justice Harlan's views on retroactivity, as modified by *Teague* and subsequent decisions, for all

cases on collateral review in our state courts." *Id.* at 1297.

2. In its decision governing the issue in this case, *State* v. *Tate*, *supra*, the Louisiana Supreme Court relied exclusively on the *Teague* framework as the relevant source of law. See 130 So. 3d at 834. The court noted that "the standards for determining retroactivity set forth in *Teague* v. *Lane* apply to all cases on collateral review in our state courts," and so the court's "analysis is directed by the *Teague* inquiry." *Ibid.* (citation and internal quotation marks omitted). The court then concluded that *Miller* is not retroactive because it does not set out a "substantive" rule within the meaning of this Court's decisions. *Id.* at 836-838. In reaching that conclusion, the Louisiana Supreme Court relied entirely on this Court's decisions to provide the relevant legal rules, rather than on any Louisiana law sources. *Id.* at 834-838.

**B. This Court Has Jurisdiction To Review Louisiana's Interpretation Of Federal *Teague* Law**

1. In *Michigan* v. *Long*, 463 U.S. 1032 (1983), this Court adopted a framework to determine whether the judgment in a state case is supported by an adequate and independent state ground. If a state-law basis for the judgment is adequate and independent, then this Court lacks jurisdiction because its review of the federal question would be purely advisory. *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991). *Long* adopted a conclusive presumption that when "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," the Court "will accept as the most reasonable explanation

that the state court decided the case the way it did because it believed that federal law required it to do so." 463 U.S. at 1040-1041.

In this case, the Louisiana Supreme Court unquestionably applied federal *Teague* principles to decide the retroactivity of *Miller*. The court relied solely on federal precedents; applied solely federal reasoning; and gave every indication that it reached the conclusion it did because it believed that federal law (*Teague*) "required it to do so." *Long*, 463 U.S. at 1041. It did not apply an independent state standard of retroactivity, but sought to apply this Court's jurisprudence to resolve the case.

That analysis under *Long* does not conclusively resolve the adequate-and-independent-state-ground question because there is an antecedent question: whether it matters that Louisiana chose to adopt *Teague* as its own test for retroactivity. Here, Louisiana "recognize[d] that [it was] not bound to adopt the Teague standards," but chose to do so because *Teague* produced more consistent results than prior law and better advanced finality interests. *Whitley*, 606 So. 2d at 1296-1297. Accordingly, while Louisiana incorporated federal *Teague* standards into its collateral-review jurisprudence, it did not do so because it believed federal law required that approach.

That situation presents a novel question under *Long*. The Court-Appointed Amicus argues (Br. 10-20) that the *Long* presumption does not apply because the Louisiana Supreme Court has established that state law (not federal law) governs the retroactivity issue and that a decision about whether that court correctly applied *Teague* would be advisory because the state could adopt a different retroactivity stand-

ard on remand. It may well be that *Long* does not fully resolve the issue in this case, because federal standards of non-retroactivity do not apply of their own force to state collateral review proceedings. See *Danforth*, 552 U.S. at 278-282. But it is not correct that this Court's review of the state court's application of *Teague* would be advisory or that this Court lacks jurisdiction to correct a state court's interpretation of incorporated federal law.[11] As explained below, this Court has recognized that it has certiorari jurisdiction to review certain embedded federal-law issues in state cases because those cases raise federal questions.

2. In *Standard Oil Co.* v. *Johnson*, 316 U.S. 481 (1942), for example, the Court exercised its jurisdiction to review a federal question on which the state law depended. California law imposed a tax on the sale of fuel but it exempted sales to the government or departments of the United States. *Id.* at 482-483. The Court recognized that it would not have been able to review whether sales to military post exchanges were

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[11] If this Court determines that the Louisiana Supreme Court misinterpreted federal *Teague* standards that controlled the state judgment, it should vacate the decision and remand for further proceedings not inconsistent with the Court's decision. On remand, the state court *could* abandon *Teague* as a matter of state law and apply a different standard, subject to federal constitutional review. But that possibility no more renders this Court's decision advisory than if this Court resolved a federal issue on review of a state case, then remanded, thus allowing the state courts to consider a new state-law ground for affirming a conviction (*e.g.*, a state-law forfeiture). See *Smith* v. *Texas*, 550 U.S. 297, 325 (2007) (Alito, J., dissenting); see also, *e.g.*, *Ohio* v. *Reiner*, 532 U.S. 17, 22 (2001) (per curiam). This Court's decision resolving the meaning of *Teague* would correct the federal law applied in this case, even if the ultimate result is affirmance on an alternative state-law ground.

exempt under state law if the state court had based its decision "purely on local law." *Id.* at 483. But because the state court had relied on federal law to find the post exchanges non-exempt, its determination was "controlled by federal law" and was a "determination of a federal question," reviewable by this Court. *Ibid.* The Court then clarified the federal-law nature of the relationships and remanded to allow California to construe its law in light of a corrected federal-law understanding. *Id.* at 485.

In *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U.S. 804 (1986), this Court explained that it has jurisdiction on certiorari to review federal questions embedded in state-court decisions in order to correct misunderstandings of federal law. In that case, the Court considered whether a State's incorporation of federal drug-labeling standards into a state-law cause of action made an action under the state statute one "arising under" the laws of the United States for purposes of federal-court jurisdiction. *Id.* at 805; see 28 U.S.C. 1331. The Court concluded that such a state-law claim may not be brought in federal district court, primarily because Congress "did not intend a private federal remedy" for violations of the federal drug-labeling law. 478 U.S. at 811-812; see *id.* at 814. But the Court recognized that, "even if there is no original district court jurisdiction" to review the state court's interpretation of federal law, "th[e] Court retains power to review the decision of a federal issue in a state cause of action" in state court through certiorari jurisdiction. *Id.* at 816 & n.14; see also *id.* at 807 (noting that the federal-question statute "confer[s] a more limited power" than Article III of the Constitution).

And in *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Engineering, P.C.*, 467 U.S. 138 (1984), the Court reviewed a decision of the North Dakota Supreme Court about whether its courts have jurisdiction to consider certain claims brought by an Indian Tribe because the decision "was influenced by a misunderstanding of federal law." *Id.* at 158. The Court explained that, although it "has no authority to revise the North Dakota Supreme Court's interpretation of state jurisdictional law," the Court "retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." *Id.* at 151-152. The Court explained that "[i]f the state court has proceeded on an incorrect perception of federal law," the Court's "practice [is] to vacate the judgment of the state court and remand the case" so the state court may reconsider the issue "free of misapprehensions about the scope of federal law." *Id.* at 152.

The Court recognized that it has jurisdiction to review an embedded question of federal law in a case decided under *Michigan* v. *Long*. See *Ohio* v. *Reiner*, 532 U.S. 17, 20 (2001) (per curiam). In *Reiner*, the Court reviewed a determination of the Ohio Supreme Court about the scope of the Fifth Amendment, which was a threshold requirement for a state immunity statute. *Ibid.* Relying on *Long*, the Court noted that the state court's decision "'fairly appears to be interwoven with the federal law'" and "no adequate and independent state ground is clear from the face of the opinion." *Ibid.* (quoting *Long*, 463 U.S. at 1040). Relying on *Merrell Dow* and *Three Affiliated Tribes*, the Court then explained that it has "jurisdiction over a state-court judgment that rests, as a threshold mat-

ter, on a determination of federal law." *Ibid.* (citing *Merrell Dow*, 478 U.S. at 816, and *Three Affiliated Tribes*, 467 U.S. at 152). After correcting the Ohio court's misconstruction of federal law, the Court remanded, expressing no opinion on "whether immunity from suit under [state law] was appropriate." *Id.* at 22.

3. The Court's cases thus recognize that the Court has the power to review a state court's interpretation of federal law, even when the state court did not have to apply that law in administering state causes of action or in interpreting state statutes. In each of the decisions discussed, the State chose to refer to a discrete portion of federal law, and this Court determined that it was appropriate to exercise its power of review in order to ensure that mistaken interpretations of federal law did not improperly influence state decisions. Although those decisions differ from this case in certain respects (for example, they concerned federal law that independently governed state or federal officials or private actors), they all recognize that this Court has the power to review, on certiorari, discrete federal questions that arise in state-court decisions when the state has elected to resolve state-law issues by applying federal law.

Applying that principle, this Court has jurisdiction to review the Louisiana Supreme Court's interpretation of *Teague* doctrine. *Teague*'s framework was not formulated to govern state collateral review; it developed to interpret the federal habeas statute. But here, the state court expressly incorporated *Teague*'s federal standard into its law, with no independent state element. And it based its decision in this case entirely on an application of that federal-law standard.

Under those circumstances, the Court has the authority to correct an erroneous understanding of federal law, leaving the state court free to reconsider the issue in light of that corrected understanding on remand. See 16B Charles Alan Wright et al., *Federal Practice and Procedure* § 4031, at 550-551 (3d ed. 2012) (concluding that a state court's "mistaken conclusions of federal law" "justify Supreme Court review after a completed state court decision has made it clear that federal questions control the outcome").

The situation in this case is not akin to a State's adoption of state counterparts to the Federal Rules of Evidence or the Federal Rules of Civil Procedure and its decision to construe those codes in light of this Court's decisions. See Br. of Court-Appointed Amicus 15-16. This case is unique because Louisiana relies solely on federal law, with no independent state component in its retroactivity analysis. State rules modeled on federal rules, by contrast, would remain ones of purely state law and could be given content through state decisions (as opposed to federal decisions). In addition, just because the Court has the power to review a state-court decision on certiorari, that does not mean that the Court must exercise that jurisdiction. Here, federalism and constitutional-avoidance issues would be furthered by this Court's correction of the State's misunderstanding of *Teague*. Those considerations do not exist when a State construes a cognate body of its own procedural law that resembles independent federal law.

4. For two reasons, it is particularly appropriate for this Court to review the *Teague* question that controlled the decision below.

First, exercising jurisdiction based on the incorporated-federal-law principle permits the Court to avoid deciding the substantial constitutional question of whether the Constitution compels retroactivity in state collateral review when an exception to *Teague* applies. This Court expressly reserved that constitutional question in *Danforth*, see 552 U.S. at 269 n.4, and it is a difficult one. If this Court does not review Louisiana's application of *Teague* principles, then it will have to confront that question here. But if the Court decides the jurisdictional issue on the narrower basis described above, it may avoid that question entirely.[12] Accordingly, avoidance principles counsel in favor of this Court's reviewing the state court's interpretation of *Teague* and leaving the question reserved in *Danforth* for another day.

Second, exercising jurisdiction based on the State's incorporation of federal law respects the role of the States in our federal system. This Court's review of the Louisiana Supreme Court's application of *Teague* would promote comity interests by avoiding intrusive federal habeas litigation. For prisoners in Louisiana, *Teague* principles will control the retroactivity of *Miller* on state collateral review and on federal habeas corpus review. If the Court finds jurisdiction and decides the merits in this case, it will provide a definitive interpretation that will apply in both forums. In the absence of a uniform rule, state prisoners will inevitably seek an intrusive round of federal habeas review in the hope that they will obtain *Miller* relief

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[12] A majority of States use the *Teague* framework (at least in part) to decide questions of retroactivity on state collateral review. See App. B, *infra* (setting out the States' approaches to retroactivity).

from federal courts after failing to obtain it in state court. But "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Coleman*, 501 U.S. at 731 (citation omitted). Correcting the state court's error affords the State the opportunity to provide a remedy for *Miller* violations in its own courts, thus avoiding the federalism costs of a second round of habeas litigation.[13]

## CONCLUSION

The judgment of the Supreme Court of Louisiana should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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JULY 2015

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[13] In the event the Court wishes to avoid or remove any question about its jurisdiction to decide the retroactivity issue, a certiorari petition is pending that raises the issue in the context of federal collateral review. See *Johnson* v. *Manis*, petition for cert. pending, No. 15-1 (filed June 29, 2015).

## APPENDIX A

## FEDERAL JUVENILE OFFENDERS WHO HAVE BEEN RESENTENCED SINCE *MILLER*

1. Angel Alejandro

Resentenced to 20 years of imprisonment for his homicide offenses and 25 years of imprisonment total for all offenses. See 7:98-CR-290-CM-LMS Am. Judgment 2 (S.D.N.Y. May 23, 2014).

2. Donnie Bryant

Resentenced to 40 years of imprisonment for his homicide offenses and 80 years of imprisonment total for all offenses. See 2:06-CR-234-PMP-GWF Am. Judgment 2 (D. Nev. Jan. 17, 2014), aff'd, No. 14-10047, 2015 WL 1884376 (9th Cir. Apr. 27, 2015).

3. Harold Evans-Garcia*

Resentenced to 32 years of imprisonment for his homicide offense and 37 years of imprisonment total for all offenses. See 3:96-CR-105-GAG Am. Judgment 2 (D.P.R. Mar. 3, 2015), appeal pending, No. 15-1392 (1st Cir. filed Apr. 7, 2015).

4. Robert James Jefferson*

Resentenced to 50 years of imprisonment for his homicide offenses and 50 years of imprisonment total for all offenses. See 0:97-CR-276-MJD-JGL Third

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* These offenders were sentenced before *United States* v. *Booker*, 543 U.S. 220 (2005), under Sentencing Guidelines that mandated sentences of life imprisonment. See note 1, *supra*.

Am. Judgment 2 (D. Minn. Feb. 4, 2015), appeal pending, No. 15-1309 (8th Cir. filed Feb. 11, 2015).

5. Kamil Hakeem Johnson

Resentenced to 42 years of imprisonment for his homicide offenses. See 0:02-CR-013-PJS-FLN Am. Judgment 2 (D. Minn. Mar. 27, 2015), appeal dismissed, No. 15-1753 (8th Cir. June 1, 2015).

6. Robert Lawrence

Resentenced to 317 months (26.4 years) of imprisonment for his homicide offenses and 377 months (31.4 years) of imprisonment total for all offenses. See 5:92-CR-035-DNH Am. Judgment 2 (N.D.N.Y. Jan. 17, 2014).

7. David Perez-Montanez*

Resentenced to 25 years of imprisonment for his homicide offense and 30 years of imprisonment total for all offenses. See 3:96-CR-244-PG Am. Judgment 2 (D.P.R. Feb. 10, 2014).

8. Branden Bruce Pete

Resentenced to 59 years of imprisonment for his homicide offenses. See 3:03-CR-355-SMM Am. Judgment 1 (D. Ariz. July 28, 2014), appeal pending, No. 14-10370 (9th Cir. oral argument scheduled for Sept. 18, 2015).

9. Dwayne Stone

Resentenced to 10 years of imprisonment for his homicide offenses and 40 years of imprisonment total for all offenses. See 1:05-CR-401-ILG Am. Judgment

3-4 (E.D.N.Y. Aug. 13, 2014), appeal pending, No. 14-3102 (2d Cir. filed Aug. 19, 2014).

10. Jerome Williams

Resentenced to 35 years of imprisonment for his kidnapping offenses. See 4:94-CR-056-ICH Second Am. Judgment 2 (E.D. Mo. June 5, 2015).

## APPENDIX B

## STATE APPROACHES TO RETROACTIVITY

1. The following States use the framework in *Teague* v. *Lane*, 489 U.S. 288 (1989), to decide retroactivity on collateral review:

Alabama. See *Ex Parte Williams*, No. 1131160, 2015 WL 1388138, at *4 (Ala. Mar. 27, 2015) (not yet released for publication).

Colorado. See *Edwards* v. *People*, 129 P.3d 977, 981-983 (Colo. 2006), cert. denied, 549 U.S. 1265 (2007).

Delaware. See *Richardson* v. *State*, 3 A.3d 233, 238 (Del. 2010).

Georgia. See *State* v. *Sosa*, 733 S.E.2d 262, 264 (Ga. 2012).

Illinois. See *People* v. *Davis*, 6 N.E.3d 709, 720-721 (Ill.), cert. denied, 135 S. Ct. 710 (2014).

Indiana. See *Membres* v. *State*, 889 N.E.2d 265, 271-273 (Ind. 2008).

Iowa. See *Perez* v. *State*, 816 N.W.2d 354, 358 n.2 (Iowa 2012).

Kansas. See *Whisler* v. *State*, 36 P.3d 290, 299-300 (Kan. 2001), cert. denied, 535 U.S. 1066 (2002).

Kentucky. See *Leonard* v. *Commonwealth*, 279 S.W.3d 151, 159-160 (Ky. 2009).

Louisiana. See *State ex rel. Taylor* v. *Whitley*, 606 So. 2d 1292, 1296-1297 (La. 1992), cert. denied, 508 U.S. 962 (1993).

Maine. See *Carmichael* v. *State*, 927 A.2d 1172, 1179 (Me.), cert. denied, 552 U.S. 1029 (2007).

Mississippi. See *Jones* v. *State*, 122 So. 3d 698, 700-702 (Miss. 2013).

Montana. See *Beach* v. *State*, 348 P.3d 629, 635-636 (Mont. 2015).

Nebraska. See *State* v. *Mantich*, 842 N.W.2d 716, 724 (Neb.), cert. denied, 135 S. Ct. 67 (2014).

New Hampshire. See *State* v. *Tallard*, 816 A.2d 977, 980 (N.H. 2003) (using *Teague* framework to decide retroactivity of federal rules but reserving question whether to use *Teague* for state rules).

New York. See *People* v. *Baret*, 16 N.E.3d 1216, 1229-1230 (N.Y. 2014), cert. denied, 135 S. Ct. 961 (2015).

North Dakota. See *Clark* v. *State*, 621 N.W.2d 576, 578-579 (N.D.), cert. denied, 532 U.S. 1043 (2001).

Oklahoma. See *Burleson* v. *Saffle*, 46 P.3d 150, 151 (Okla. Crim. App. 2002).

Pennsylvania. See *Commonwealth* v. *Cunningham*, 81 A.3d 1, 8-9 (Pa. 2013) (using *Teague* as the "default" test for retroactivity but noting that court will entertain arguments in favor of "broader retrospective extension of a new federal constitutional rule"), cert. denied, 134 S. Ct. 2724 (2014).

Rhode Island. See *Pierce* v. *Wall*, 941 A.2d 189, 195 (R.I. 2008).

South Carolina. See *Aiken* v. *Byars*, 765 S.E.2d 572, 575 & n.4 (S.C. 2014) (using *Teague* without "ad-

dress[ing] whether it should employ a more expansive analysis for determining retroactivity after *Danforth* [v. *Minnesota*, 552 U.S. 264 (2008)]"), cert. denied, 135 S. Ct. 2379 (2015).

South Dakota. See *Siers* v. *Weber*, 851 N.W.2d 731, 740-742 (S.D. 2014).

Tennessee. See *Bush* v. *State*, 428 S.W.3d 1, 20 (Tenn. 2014) (using retroactivity standard set out in Tenn. Code. Ann. § 40-30-122, which court has interpreted to codify *Teague*).

Vermont. See *State* v. *White*, 944 A.2d 203, 207-208 (Vt. 2007).

Virginia. See *Mueller* v. *Murray*, 478 S.E.2d 542, 546-549 (Va. 1996).

2. The following States and the District of Columbia follow *Teague* in part to decide retroactivity on collateral review:

Arizona. See *State* v. *Towery*, 64 P.3d 828, 835 (Ariz.) (applying both *Teague* and an approach based on *Linkletter* v. *Walker*, 381 U.S. 618 (1965)), cert. dismissed, 539 U.S. 986 (2003).

California. See *In re Gomez*, 199 P.3d 574, 576-577 & n.3 (Cal. 2009) (applying *Teague* to decide retroactivity of federal constitutional rule, while noting that court can "give greater retroactive impact to a decision than the federal courts choose to give"); see also *In re Hansen*, 174 Cal. Rptr. 3d 146, 153 (Ct. App. 2014) (stating that California Supreme Court "has not articulated a single test to determine when and under what

circumstances a decision should be given retroactive effect to convictions that are final on appeal").

Connecticut. See *Thiersaint* v. *Commissioner of Corr.*, 111 A.3d 829, 840-843 (Conn. 2015) ("adopt[ing] the framework established in *Teague*" but stating that, "while federal decisions applying *Teague* may be instructive, this court will not be bound by those decisions in any particular case, but will conduct an independent analysis and application of *Teague*").

District of Columbia. See *Gathers* v. *United States*, 977 A.2d 969, 971-973 (D.C. 2009) (beginning with *Teague* principles but also applying D.C. retroactivity law).

Hawaii. Compare *State* v. *Gomes*, 113 P.3d 184, 189 (Haw. 2005) (applying *Teague* to decide retroactivity of new federal rule), with *State* v. *Jess*, 184 P.3d 133, 154 n.20 (Haw. 2008) (applying *Linkletter*-based test to decide retroactivity of new state rule).

Idaho. See *Rhoades* v. *State*, 233 P.3d 61, 64, 70 (Idaho 2010) (starting with the *Teague* framework but noting that the court will apply its "independent judgment, based upon the concerns of this Court and the uniqueness of our state, our Constitution, and our long-standing jurisprudence" (citation and internal quotation marks omitted)), cert. denied, 562 U.S. 1258 (2011).

Massachusetts. See *Commonwealth* v. *Sylvain*, 995 N.E.2d 760, 765-766, 768-770 (Mass. 2013) (applying *Teague* but using a different approach to determine whether a rule is "new").

Michigan. See *People* v. *Carp*, 852 N.W.2d 801, 808, 818-819, 832-833 (Mich. 2014) (using both *Teague* and a separate, *Linkletter*-based state test to decide retroactivity), petitions for cert. pending, No. 14-824 (filed Jan. 9, 2015), No. 14-8106 (filed Jan. 20, 2015).

Minnesota. See *Danforth* v. *State*, 761 N.W.2d 493, 498-500 (Minn. 2009) (adopting *Teague* but noting that court is "not bound by the U.S. Supreme Court's determination of fundamental fairness" and "will independently review cases to determine whether they meet our understanding of fundamental fairness").

Nevada. See *Colwell* v. *State*, 59 P.3d 463, 471-472 (Nev. 2002) (per curiam) ("adopt[ing] the general framework of *Teague*" but "reserv[ing] our prerogative to define and determine within this framework whether a rule is new and whether it falls within the two exceptions to nonretroactivity (as long as we give new federal constitutional rules at least as much retroactive effect as *Teague* does)"), cert. denied, 540 U.S. 981 (2003).

New Jersey. See *State* v. *Gaitan*, 37 A.3d 1089, 1103-1104, 1108-1109 & n.11 (N.J. 2012) (applying *Teague* and *Linkletter*-based test to decide retroactivity of federal rules), cert. denied, 133 S. Ct. 1454 (2013).

New Mexico. See *Kersey* v. *Hatch*, 237 P.3d 683, 688-691 (N.M. 2010) (applying *Teague* to decide retroactivity of federal and state rules); but see *State* v. *Forbes*, 119 P.3d 144, 146-147 (N.M. 2005) (applying *Teague* to decide retroactivity of federal rule but also

relying on state-specific considerations), cert. denied, 549 U.S. 1274 (2007).

North Carolina. See *State* v. *Zuniga*, 444 S.E.2d 443, 446 (N.C. 1994) (applying *Teague* to decide retroactivity of federal rules and applying a state test for state rules).

Oregon. See *Page* v. *Palmateer*, 84 P.3d 133, 136-137 & n.1 (Or.) (applying *Teague* to decide retroactivity of federal rules but noting that it has applied different standards for state rules), cert. denied, 543 U.S. 866 (2004).

Texas. See *Ex parte Maxwell*, 424 S.W.3d 66, 70-71 (Tex. Crim. App. 2014) (following *Teague* "as a general matter of state habeas practice"); but see *Taylor* v. *State*, 10 S.W.3d 673, 679-681 (Tex. Crim. App. 2000) (applying *Linkletter*-based test to decide retroactivity of new state rules).

Washington. See *In re Tsai*, 351 P.3d 138, 143-144 (Wash. 2015) (applying *Teague* to decide retroactivity of a federal rule but also relying on state-specific considerations).

Wisconsin. See *State* v. *Lagundoye*, 674 N.W.2d 526, 531-533 & n.11 (Wis. 2004) (applying *Teague*, except that court allows non-retroactive new rules to be created and applied on collateral review).

Wyoming. See *State* v. *Mares*, 335 P.3d 487, 499-504 (Wyo. 2014) (applying *Teague* to decide retroactivity of new constitutional rules but reserving the right to "apply the *Teague* analysis more liberally than the United States Supreme Court would otherwise

apply it where a particular state interest is better served by a broader retroactivity ruling").

3. The following States use frameworks different from *Teague* to decide retroactivity on collateral review:

Alaska. See *State* v. *Smart*, 202 P.3d 1130, 1136-1138, 1140 (Alaska 2009) (using *Linkletter*-based test).

Florida. See *Falcon* v. *State*, 162 So. 3d 954, 956, 960-961 (Fla. 2015) (using *Linkletter*-based test).

Missouri. See *State* v. *Whitfield*, 107 S.W.3d 253, 267-268 (Mo. 2003) (using *Linkletter*-based test).

Utah. See *Labrum* v. *Utah State Bd. of Pardons*, 870 P.2d 902, 911-912 (Utah 1993) (using *Linkletter*-based test).

West Virginia. See *State* v. *Kennedy*, 735 S.E.2d 905, 923-924 (W. Va. 2012) (using *Linkletter*-based test).

4. The following States have not decided whether to follow *Teague* or have not clearly stated their approach to retroactivity on collateral review:

Arkansas. See *Kelley* v. *Gordon*, No. CV-14-1082, 2015 WL 3814285, at *6 (Ark. June 18, 2015) ("We have never expressly adopted the *Teague* rule, and we hold that the particular posture of this case makes it unnecessary to decide as a general matter whether this court will do so.").

Maryland. See *Miller* v. *State*, 77 A.3d 1030, 1042-1044 (Md. 2013) (noting that Maryland "ha[s]

never expressly adopted *Teague*," then applying *Teague* and state-law standards).

Ohio. See *State* v. *Bishop*, 7 N.E.3d 605, 610 (Ohio Ct. App. 2014) (per curiam) (noting that, although "several Ohio appellate districts have applied *Teague*," the Ohio Supreme Court used the *Linkletter* test in a 1965 case and "has not yet had an opportunity to apply *Teague*").